BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICIA A. DURR
Claimant
VS.

GEORGE LEARNED, M.D.
Respondent
AND

STATE FARM FIRE & CASUALTY CO.
Insurance Carrier
AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 152,019

ORDER

ON the 11th day of January, 1994, the application of the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Floyd V. Palmer on November 5, 1993, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared not as all issues between the claimant and respondent have been settled. The respondent and insurance carrier, appeared by and through their attorney, Rex W. Henoch, of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Eugene C. Riling, of Lawrence, Kansas. There were no other appearances.

RECORD

The record of the Administrative Law Judge set forth in the November 5, 1993 Award is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations of the Administrative Law Judge contained in the November 5, 1993 Award are herein adopted by the Appeals Board.

ISSUES

(1) What is the liability of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

(1) The Appeals Board finds that the respondent has established by a preponderance of the credible evidence that claimant was a handicapped employee as defined in K.S.A. 44-566, that her employer retained her in his employment after acquiring knowledge of this handicap, that her preexisting physical impairment was a contributing factor to her subsequent injury, and that the Kansas Workers Compensation Fund is liable and shall reimburse to the respondent fifty percent (50%) of all of the monies paid in this matter for temporary total disability, temporary partial or permanent partial disability, vocational rehabilitation, medical expenses, and all additional costs and expenses associated with the litigation of this matter.

Claimant, a medical assistant, suffered personal injury by accident arising out of and in the course of her employment with respondent when she fell over a stoop at work and broke her hip.

Medical treatment for the fractured hip was provided by Dr. Kenneth Wertzberger, an orthopedic surgeon. Dr. Wertzberger placed a nail in her fractured hip but the nail failed to hold due to an avascular osteopenic softening of claimant's bone. This soft bone condition was caused by claimant's long history of anorexia.

As a result of the failure of the nail Dr. Wertzberger was forced to replace the bone with a hip prosthesis. After insertion of the prosthesis claimant experienced a normal range of motion in her hip and was able to move about with little or no complaints of pain.

Dr. Wertzberger opined that the surgical placement of a hip nail into a hip subsequent to a fracture without need for a prosthesis would equate to a five percent (5%) permanent partial impairment to the body as a whole. The need for the prosthesis causes the claimant's rating to increase from five percent (5%) to ten percent (10%) to the body as a whole on a functional basis. The surgical placement of the hip prosthesis subsequent to the diagnoses of the avascular osteopenic bone was directly traceable to the claimant's anorexia.

Dr. Wertzberger, in discussing claimant's functional impairment, opined claimant had an additional five percent (5%) impairment stemming from her continued and increased complaints subsequent to the surgery but expressed no opinion as to whether this five percent (5%) increase stemmed from the original fracture or from the surgical placement of the prosthesis subsequent to the bone failure.

Dr. Wertzberger felt that this anorexic condition would constitute a handicap in the claimant's ability to obtain or retain employment in the open labor market as it would put claimant at a disadvantage in seeking employment in any type of job requiring more than sedentary activities.

The claimant's employer, Dr. George R. Learned, had employed claimant for over 25 years. He had long been aware of claimant's anorexia and had, over the years, provided treatment including potassium supplements. Dr. Learned was aware of the physical impact of anorexia on the bone structure of the body and as a result of this awareness restricted claimant's activities to light and sedentary work. Dr. Learned specifically prohibited claimant from heavy lifting and, while he did not specifically relay this information to the claimant, assigned her only to work duties which would allow her to perform work tasks without need for heavy lifting. Dr. Learned, in his practice, dealt with osteopenia on a regular basis, as a good portion of his practice dealt with geriatric patients, and was of the opinion that a person suffering from anorexia and osteopenia would suffer greater damage from a short distance fall than would a healthy person.

The purpose of the Kansas Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

Liability will be assessed against the workers compensation fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work related injury. An employee is handicapped under the Act if the employee is "afflicted with an impairment of such a character as to constitute a handicap in obtaining or retaining employment." Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980).

K.S.A. 44-567(b) provides in part:

> "In order to be relieved of liability under this section, the employer must prove either that the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or that the employer retained the employee after acquiring such knowledge."

The employer has the burden of proving that it knowingly hired or retained the

handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984). The standard of the employer is proof by a preponderance of the credible evidence, not by clear and convincing evidence or beyond a reasonable doubt. Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 264, 740 P.2d 98 (1987), affirmed, 242 Kan. 430, 748 P.2d 420 (1988).

Fund statutes are remedial in character and are not to be interpreted in a narrow, technical manner. A liberal construction of its provisions should be indulged, if necessary, to give effect to the purpose intended by the legislature. Leiker v. Manor House, Inc., 203 Kan. 906, 913, 457 P.2d 107 (1969). The provisions imposing liability upon the Fund are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees. Morgan, supra at 323.

The testimony of Dr. Wertzberger and Dr. Learned established that, 1) the claimant was a handicapped employee as defined by K.S.A. 44-566(b); 2) that the employee was retained after the employer acquired knowledge of this preexisting impairment; and, 3) that the employee then sustained a second injury for which compensation should be paid by the Kansas Workers Compensation Fund. Spencer v. Daniel Constr. Co., 4 Kan. App. 2d 613, 619, 609 P.2d 687; rev. denied 228 Kan. 807 (1980); Brozek v. Lincoln County Highway Dept., 10 Kan. App. 2d 319, 321, 698 P.2d 392 (1985).

The Appeals Board finds that the injury suffered by claimant on November 28, 1989, probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical impairment but the resulting disability was contributed to by the preexisting impairment and that this preexisting condition contributed fifty percent (50%) to the total impairment suffered by claimant as a result of this injury.

The settlement entered into between the claimant and respondent is numerically different from the Award entered by Administrative Law Judge Floyd V. Palmer on November 5, 1993. Case law in Kansas is clear that regardless of the terms of a settlement between an injured employee and his or her employer, the apportionment of a reimbursement award between the employer and the Fund must be based upon the actual amount of disability which is attributable to the second injury. Brozek, supra at 325. Nevertheless, the respondent and the Fund have stipulated that the settlement amounts paid by the respondent to the claimant are appropriate as the basis for the Appeals Board's award in this matter and the restrictions regarding the terms of settlement set out in Brozek, are waived by the Kansas Workers Compensation Fund.

The Appeals Board thus finds that the fifty percent (50%) contribution due and owing from the Kansas Workers Compensation Fund shall be computed to include all monies paid by the respondent to the claimant as a result of the prior settlement entered into between the parties in this matter.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board after reviewing the entire record, that the respondent has established by a preponderance of the credible evidence, that the claimant was a handicapped employee, that her employer knowingly retained her in said employment subsequent to acquiring knowledge of this preexisting impairment, and that her preexisting physical impairment was a contributing factor in her subsequent injury. The Kansas Workers Compensation Fund shall be responsible for fifty percent (50%) of all compensation paid in this matter as either temporary total, temporary partial or permanent partial, vocational rehabilitation, medical

expenses, and any and all costs and expenses associated with the litigation of this matter including any and all funds paid to the claimant in the settlement of this matter.

The Appeals Board further finds the fees necessary to defray the expense of administration of this action are hereby assessed against the respondent and the Kansas Workers Compensation Fund, to be shared equally, to be paid as follows:

APPINO & ACHTEN REPORTING SERVICE Transcript of Regular Hearing, Dated October 22, 1991 Transcript of Preliminary Hearing, Dated February 13, 1991 Transcript of Preliminary Hearing, Dated July 15, 1991 Deposition of Michael D. O'Brien, Dated January 15, 1992	$ 946.60
APPINO & ACHTEN REPORTING SERVICE Deposition of Michael D. O'Brien, Dated November 13, 1991	Unknown
METROPOLITAN COURT REPORTERS, INC. Deposition of Daniel R. Fischer, Dated January 13, 1992 Deposition of Janice Johnson, Dated January 20, 1992	$ 751.65
CANDACE K. BRAKSICK, CSR, RPR, CM Deposition of George R. Learned, M.D., Dated December 3, 1991 Deposition of Kenneth L. Wertzberger, M.D., Dated November 11, 1991	$ 733.70

IT IS SO ORDERED.

Dated this _____ day of February, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Rex W. Henoch, 707 Minnesota Ave., 4th Floor, Kansas City, Kansas 66117
Eugene C. Riling, P.O. Box B, Lawrence, Kansas 66044
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director